IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CIVIL ACTION NO. 1:07-cv-231

| | |
|---|---|
| C. BURGESS, | ) |
| Plaintiff, | ) |
| vs. | ) |
| EFORCE MEDIA, INC.; IWIZARD HOLDING, INC.; ADKNOWLEDGE, INC.; BASEBALL EXPRESS, INC.; ALLEN-EDMONDS SHOE CORPORATION; INTERSEARCH GROUP, INC.; TRUSCO MANUFACTURING COMPANY; PRICEGRABBER.COM, INC.; SHOPZILLA, INC.; DAZADI, INC.; SIX THREE ZERO ENTERPRISES, LLC, | ) |
| Defendants. | ) |

**DEFENDANT iWIZARD HOLDING, INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

THIS MATTER is before the Court on Defendant iWizard Holding, Inc.'s Motion to Dismiss the Plaintiff's action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Specifically, the Plaintiff lacks standing to bring a private cause of action under the federal CAN-SPAM Act against this Defendant. Moreover, to the extent the Plaintiff seeks punitive damages against this Defendant, the Plaintiff has failed to plead any specific facts demonstrating that this Defendant participated or engaged in any conduct tantamount to fraud, malice, or engaged

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in any willful or wanton conduct. Accordingly, the Plaintiff's action against this Defendant should be dismissed.

## **FACTS**

With respect to Defendant iWizard Holding, Inc. (hereinafter "iWizard"), the Plaintiff filed the present action alleging that Defendant iWizard repeatedly sent emails to the Plaintiff in violation of the federal CAN-SPAM Act. *(Complaint ¶19).* The Plaintiff alleges that he has repeatedly attempted to have his email address removed from its mailings, without success. *Id.* The Plaintiff also alleges that the emails were not solicited and were unwelcomed. *(Complaint ¶20).* The Plaintiff contends that he has suffered loss of time and productivity in having to constantly remove the emails sent to him by the Defendants named in Count One. *(Complaint ¶23).* Moreover, the Plaintiff contends that the Defendants named in Count One, which includes Defendant iWizard, have invaded the privacy of the Plaintiff by constantly sending unsolicited emails. *(Complaint ¶24).* Of course, Defendant iWizard denies the Plaintiff's allegations, but recognizes that for purposes of this Motion, the Court must accept the allegations in a light most favorable to the Plaintiff.

## **ARGUMENT**

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of the complaint. *Microsoft Corp. v. Computer Support Services of Carolina, Inc., et al,* 123 F. Supp. 2d 945, 949 (WDNC

2000). In determining whether to dismiss under Rule 12(b)(6), the court accepts the factual allegations in the complaint and construes those facts in the light most favorable to the plaintiff. *Jackson v. Blue Dolphin Communications of NC, LLC, et al,* 226 F. Supp. 2d 785, 788 (WDNC 2002) *(citing Flood v. New Hanover County,* 125 F.3d 249, 251 (4th Cir. 1997)); *French v. The Chosin Few, Inc.,* 173 F. Supp. 2d 451, 456 (WDNC 2001). A motion to dismiss should be granted if "the complaint itself fails to allege the elements for a cause of action or facts sufficient to support such elements." *Pritchard v. Sladoje,* No. 3:06-cv-278, 2007 U.S. Dist. LEXIS 23039 at *3-4 (WDNC March 28, 2007) *(citing Bass v. E.I. DuPont De Nemours & Co.,* 324 F.3d 761, 765 (4th Cir.), *cert. denied,* 540 U.S. 940, 124 S. Ct. 301, 157 L. Ed. 2d 253 (2003)). Moreover, "allegations must be stated in terms that are neither vague nor conclusory." *Id. (citing Estate Constr. Co. v. Miller & Smith Holding Co.,* 14 F.3d 213, 220 (4th Cir. 1994)).

## I. The Plaintiff Lacks Standing to Bring a Private Cause of Action Under The CAN-SPAM Act Against Defendant iWizard and, Therefore, the Complaint Fails to State a Cause of Action as to Defendant iWizard.

In the present action, the only cause of action asserted against Defendant iWizard arises out of an alleged violation of the federal CAN-SPAM Act. The CAN-SPAM Act explicitly provides, in part,

> This Act supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

*15 U.S.C. § 7707(b)(1).* In *Omega World Travel, Inc. v. Mummagraphics, Incorporated,* 469 F.3d 348 (4th Cir. 2006), the court held that the CAN-SPAM Act superseded any state laws dealing with unsolicited commercial emails, except to the extent such state law dealt with falsity or deception. *Id. at 359. See also Kleffman v. Vonage Holdings Corp., et al,* No. cv 07-2406, 2007 U.S. Dist. LEXIS 40487 (C.D. Cal. May 2007). With respect to Defendant iWizard, the Plaintiff does not allege that any portion of the emails was false or deceptive. Accordingly, the federal CAN-SPAM Act controls the instant action. Moreover, the Complaint specifically alleges that the claim against Defendant iWizard is brought under the federal CAN-SPAM Act.

The CAN-SPAM Act's enforcement provisions empower only certain parties with the right to pursue alleged violators of the Act. *15 U.S.C. §7706.* Specifically, the Federal Trade Commission, certain other federal agencies, and States may bring civil enforcement actions. *15 U.S.C. § 7706(a), (b), (f). Gordon v. Virtumundo, Inc., et al,* No. 06-0204-JCC, 2007 U.S. Dist. LEXIS 35544 at *7-8 (W.D. Wash. May 2007). Although a limited private right of action also exists, the Plaintiff is not one of the parties authorized by the Act to bring a private cause of action or a civil enforcement action under the CAN-SPAM Act. A private cause of action under the CAN-SPAM Act can only be brought by a provider of internet access service who has been adversely affected by a violation under the Act. *Id.* In the present case, the Complaint is devoid of any allegations setting forth that the Plaintiff is a provider of internet access service. Instead, the Complaint merely alleges that the Plaintiff owns his own computer and that he pays for his access to the internet. Said allegations are insufficient to elevate the Plaintiff to the status of a provider of internet access service. Moreover, the Complaint is devoid of any allegations demonstrating that the Plaintiff has been adversely affected by the emails he allegedly received from Defendant iWizard. In *Gordon,* the court noted that:

> The most significant harms enumerated by Congress were ISP- or IAS- specific, going well beyond the consumer-specific burden of sorting through an inbox full of spam. These harms to IASs or ISPs relate to network functioning, bandwidth usage, increased demands for personnel, and new equipment needs, which eventually cost consumers.

*Gordon,* 2007 U.S. Dist. LEXIS 35544 at *22-23. In the present case, the Plaintiff merely alleges that he has suffered loss of time and productivity in having to constantly remove the emails sent to him by the Defendants named in Count One. *(Complaint ¶23).* As noted by the court in *Gordon,* the CAN-SPAM Act does not confer a private right of action on consumers who are annoyed by having to sort through an inbox of spam. As such, the Plaintiff lacks standing to bring a private cause of action against this Defendant under the CAN-SPAM Act.

## II. To the Extent the Complaint Seeks Punitive Damages Against Defendant iWizard, the Plaintiff Has Failed to Plead Any Facts Demonstrating the Requisite Aggravating Factors of Fraud, Malice, or Willful or Wanton Conduct.

It is not clear from the Complaint whether the Plaintiff's demand for punitive damages is applicable to all of the Defendants or just the Defendants in Count Two. To the extent the Complaint seeks punitive damages against Defendant iWizard, the Plaintiff has failed to state a claim upon which relief can be granted. As a general rule, punitive damages may only be awarded if the Plaintiff proves that the Defendant is liable for compensatory damages and that one of the aggravating factors of fraud, malice, or willful or wanton conduct was present and was related to the injury for which compensatory damages were awarded. *Southstar Funding, LLC v. Warren, Perry & Anthony, PLLC,* 445 F. Supp. 2d 583 (EDNC 2006). In the present case, the Plaintiff fails to plead any specific facts suggesting that Defendant iWizard committed fraud, acted with malice, or engaged in willful or wanton conduct. The Plaintiff does not allege that any of the Count One Defendants illegally caused a worm or virus to be placed on his computer. Instead, those allegations are directed to the Defendants identified in Count Two of the Complaint. Accordingly, the Plaintiff has not met his burden under the pleading standards in setting forth facts sufficient to allege a claim for punitive damages against this Defendant. Therefore, any claims for punitive damages asserted against this Defendant should be dismissed.

## CONCLUSION

In conclusion, the Defendant iWizard respectfully requests that the Plaintiff's action against it be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

Respectfully submitted the 20th day of July, 2007.

ROBERTS & STEVENS, P.A.

s/ Jacqueline D. Grant
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## CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed a copy of the foregoing ***DEFENDANT iWIZARD HOLDING, INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS*** with the Clerk of Court using the ECF system that will send notification thereof to the following:

| | |
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I further certify that I have served a copy of the foregoing ***DEFENDANT iWIZARD HOLDING, INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS*** on the Plaintiff by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to:

C. Burgess
P.O. Box 6355
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THIS the 20th day of July, 2007.

s/ Jacqueline D. Grant

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